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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a proceeding under section 4 of the Natural Gas Act involving a proposed increase in resale rates of Arkansas Louisiana Gas Company where the Federal Energy Regulatory Commission denied the proposed increase in its entirety and ordered an additional rate reduction, the Commission exceeded its statutory authority in ordering the company to make refunds of amounts greater than the proposed increase, thereby requiring a retroactive rate reduction below the level found just and reasonable in the company's previous rate proceeding, contrary to *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

2. Whether the Commission may, through adoption of a regulation pertaining to the filing of purchased gas adjustment rate increases, enlarge the authority delegated to it under sections 4 and 5 of the Natural Gas Act, contrary to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

LIST OF PARTIES

Public Agencies:

Federal

Federal Energy Regulatory Commission

City

City of Winfield, Kansas

Interstate Natural Gas Pipeline Companies:

Arkansas Louisiana Gas Company, a division of Arkla, Inc.

Northwest Central Pipeline Corporation, formerly Cities Service Gas Company.

List of Petitioner's Parents, Subsidiaries, And Affiliates Pursuant To Rule 28.1:

Arkansas Louisiana Gas Company is a division of Arkla, Inc.

All subsidiaries of Arkla, Inc. are wholly owned.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	
1. Factual Background	4
2. Proceedings Below	7
REASONS FOR GRANTING THE WRIT	9
1. The Commission Has No Retroactive Rate Reduction Authority	10
2. The Commission Lacks Authority to Grant Itself Power Withheld by Statute	13
3. The Language of the Commission's Regulation Does Not Authorize The Commission's Action Here	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 15
Distrigas of Massachusetts Corp. v. FERC, 737 F.2d 1208 (1st Cir. 1984) 9, 11, 17
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) .. 9, 13
Florida Gas Transmission Co. v. FERC, No. 82-6041 (11th Cir. Sept. 17, 1984) 12
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 9, 11
FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968) ..... *passim*
National Assoc. of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) 14
Office of Consumers' Counsel v. FERC, 655 F.2d 1132 (D.C. Cir. 1980) 13
Trans-American Freight Lines, Inc. v. Bruda Miller Freight Systems, Inc., 423 U.S. 28 (1975) 1

Administrative Opinions and Orders:

Arkansas Louisiana Gas Co.

Opinion No. 71; Opinion and Order Affirming in Part and Modifying in Part Initial Decision, 10 F.E.R.C. (CCH) ¶ 61,027 (Jan. 11, 1980) 4, 5
Opinion No. 71-A, Opinion and Order on Remand, 19 F.E.R.C. (CCH) ¶ 61,012 (April 6, 1982) 4, 5

East Tennessee Natural Gas Co., 27 F.E.R.C. (CCH) ¶ 61,480 (June 29, 1984) 14
El Paso Natural Gas Co., 26 F.E.R.C. (CCH) ¶ 61,423 (March 30, 1984) 14
Florida Gas Co., Order Deciding Reserved Issue, 19 F.E.R.C. (CCH) ¶ 61,293 (June 24, 1982) 12
Midwestern Gas Transmission Co., 27 F.E.R.C. (CCH) ¶ 61,481 (June 29, 1984) 14
Montana-Dakota Utilities Co., 23 F.E.R.C. ¶ 61,162 (April 29, 1983) 14
Northwest Pipeline Corp., 26 F.E.R.C. (CCH) ¶ 61,417 (March 30, 1984) 14

TABLE OF AUTHORITIES—Continued

Statutes: Page

Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* (1982)

Section 1(b), 15 U.S.C. § 717(b) 4, 14
Section 4, 15 U.S.C. § 717c ..... *passim*
Section 5, 15 U.S.C. § 717d ..... *passim*
Section 19(b), 15 U.S.C. § 717r(b) 2, 3, 8

28 U.S.C. § 1254(1) 3

Commission Regulations:

18 C.F.R. § 154.38(d)(4) (1983) ..... *passim*
18 C.F.R. § 154.63 (1983) 5, 16

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No.

ARKANSAS LOUISIANA GAS COMPANY,
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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Arkansas Louisiana Gas Company a division of Arkla, Inc. ("Arkla") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 14, 1984, in *Arkansas Louisiana Gas Company, a Division of Arkla, Inc. v. Federal Energy Regulatory Commission*, No. 83-1548.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported,[1] and is reproduced at Appendix 3a-6a.[2] An unreported

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[1] Pursuant to Local Rule 13(c) of the rules of the court below, a *per curiam* memorandum was issued which will not be published. In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975), this Court granted certiorari to review an unpublished opinion of the Seventh Circuit, and then, after briefing and argument, reversed.

[2] Together with this petition, Petitioner is filing a separate Appendix which contains the opinions in this matter, including the

order, filed August 8, 1984, denying a timely petition for rehearing is reproduced at App. 7a. The court below affirmed an opinion and order of the Federal Energy Regulatory Commission ("Commission") styled Opinion No. 160, issued on February 4, 1983 (22 F.E.R.C. (CCH) ¶ 61,125) which is reproduced at App. 8a-17a. Opinion No. 160 summarily affirmed an initial decision of an administrative law judge ("ALJ") issued on April 15, 1982 (19 F.E.R.C. (CCH) ¶ 63,008), pertinent portions of which are reproduced at App. 20a-25a.[3] By Opinion No. 160-A, issued April 6, 1983 (23 F.E.R.C. (CCH) ¶ 61,030), the Commission denied Arkla's application for rehearing. That opinion is reproduced at App. 18a-19a.

JURISDICTION

1. The court of appeals affirmed a Commission order requiring Arkla to make a retroactive rate reduction below the level of Arkla's previously determined just and reasonable rate, contrary to sections 4 and 5 of the Natural Gas Act ("Act"), 15 U.S.C. §§ 717c and 717d, as defined in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). The Commission had jurisdiction to review Arkla's rates pursuant to sections 4 and 5 of the Act. Arkla sought court review pursuant to section 19(b) of the Act, 15 U.S.C. § 717r(b).

2. The court of appeals entered judgment on June 14, 1984. (App. 1a-2a). The court of appeals denied rehearing on August 8, 1984. (App. 7a).

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judgment below. The appendix also includes pertinent portions of the statutes and regulations. The Appendix will be referred to as "App.", followed by the appropriate page number.

[3] Petitioner is bringing before this Court for review only one issue out of several arising from a rate increase filing submitted to the Commission. Accordingly, only the portion of the ALJ's lengthy initial decision that deals with this specific issue is reproduced in the Appendix.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

The pertinent portion of section 4(e) of the Act, 15 U.S.C. § 717c(e) reads as follows:

> Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate amounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.[4]

The pertinent portion of section 5(a) of the Act, 15 U.S.C. § 717d(a) reads as follows:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.[5]

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[4] The full text of section 4 is reproduced at App. 26a-28a.

[5] The full text of section 5 is reproduced at App. 28a-29a.

STATEMENT OF THE CASE

1. Factual Background

Petitioner, Arkla, is a natural gas company as defined in the Natural Gas Act by virtue of making sales of natural gas for resale under two rate schedules on file with the Commission. Its principal jurisdictional sale[6] is to Northwest Central Pipeline Corporation under its Rate Schedule No. X-26. Arkla also makes four town border sales for resale in Oklahoma and Kansas under its Rate Schedule No. G-2.

Pursuant to section 4 of the Act and the Commission's regulations thereunder, in April 1980, Arkla tendered for filing with the Commission changes in its Rate Schedules Nos. X-26 and G-2 proposing an increase in annual revenues of approximately $4,000,000.[7] This rate increase was the first general increase proposed by Arkla subsequent to November 1, 1977, the date upon which Arkla's rates were made effective pursuant to Commission Opinion Nos. 71 and 71-A, 10 FERC (CCH) ¶ 61,027 (1980), and 19 FERC (CCH) ¶ 61,012 (1982), respectively. The Commission suspended Arkla's proposed increases in this case for the statutory period of five months so that they became effective, subject to refund, on November 1, 1980.

Arkla's underlying rate, *i.e.*, the rate in effect, not subject to refund, immediately prior to submittal of the rate increase was made up of two components:

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[6] "Jurisdictional sale" is a shorthand expression referring to a sale of natural gas in interstate commerce for resale subject to the Commission's jurisdiction pursuant to section 1(b) of the Act.

[7] The rates under the X-26 and G-2 Rate Schedules are basically the same, the only difference being the measurement pressure base. Accordingly, for purposes of this case, the rates are assumed to be identical.

(1) the base tariff rate that had been approved in the earlier proceedings in Opinion Nos. 71 and 71-A (hereafter Opinion No. 71), and

(2) the cumulative purchased gas adjustments (PGA) that had become effective without refund obligation subsequent to November, 1977, through April, 1980.

Section 154.38(d)(4) of the Commission's regulations, 18 C.F.R. § 154.38(d)(4)(1983),[8] provides that natural gas pipeline companies may file purchased gas cost adjustments (PGA) every six months. These PGA adjustments permit pipelines to pass through to their customers the increases in their own purchased gas costs. In net effect, the PGA adjustments are "wash" transactions permitting the pipelines to pass through changes in purchased gas costs on a relatively current basis. Companies having PGA provisions are required to file new base tariff rates supported by cost of service studies at least once every three years. As permitted by section 154.38(d)(4)(vi)(b), Arkla filed the instant rate increase six months prior to the end of the three-year period following the effective date of the Opinion No. 71 rates. This filing was submitted pursuant to section 154.63 of the Commission's regulations dealing with general rate increases, but it also satisfied the three-year requirement of section 154.38(d)(4)(vi)(a).

The following table sets forth Arkla's base rates under Opinion No. 71, the cumulative PGA adjustments subsequent to November 1, 1977, and the proposed rates under Arkla's G-2 Rate Schedule. The last line of the table shows the effect of the Commission imposed rate in Opinion No. 160. The situation respecting the X-26 Rate Schedule is comparable.

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[8] Section 154.38(d)(4) is reproduced at App. 30a-41a.

G-2 Rate Schedule (in cents per Mcf at 14.73 psia)

Pre-existing (Op. No. 71)[9] Base Rate	Cumulative PGA Adj.	Effective Underlying Rate
78.11	90.62	168.73

Newly Filed Base Rate (exclusive of cumulative PGA adjustment)	Cumulative PGA Adj.	Proposed Rate
87.63	90.62	178.25

Commission Imposed Rate

Revised Base Rate (Exclusive of PGA)	Uncontested PGA	New Base Rate (incl. cumulated PGA)
65.47	90.62	156.09

By its filings at issue here, Arkla sought only to increase its existing base rate of 78.11 cents per Mcf to 87.63 cents per Mcf, or an increase of 9.52 cents per Mcf. The following undisputed facts are significant. Arkla proposed no change in its cumulative PGA adjustment of 90.62 cents per Mcf (R. 129, 147). All the PGA adjustments had been permitted to go into effect without any refund obligation. No issue was raised before the Commission in this proceeding as to the amount or propriety of the PGA adjustments. (R. 15). Neither the ALJ nor the Commission made any finding that the PGA adjustments were excessive, unjust, or unreasonable.[10] Arkla was passing through the total 90.62 cents per Mcf of PGA adjustments paid to its suppliers.[11]

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[9] The figures have not been adjusted to reflect the effect of Opinion No. 71-A, nor the Supreme Court decision in *Public Service Commission of New York v. Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983). Those adjustment result in a slight increase in the base rates but do not affect the issue involved here.

[10] Initial Decision of the Administrative Law Judge, 19 F.E.R.C. at 65,064-66; Opinion No. 160, 22 F.E.R.C. at 61,196; Opinion No. 160-A, 23 F.E.R.C. at 61,074.

[11] *See* section 154.38(d)(4) of the Commission's regulations, 18 C.F.R. § 154.38(d)(4) (1983).

Thus, prior to its increased rate filing, Arkla was collecting 168.73 cents per Mcf without any refund obligation. The proposed increase put at issue the cost justification for the 9.52-cent increase in the base rate for a period from November 1, 1980, to June 1, 1982, when a new rate became effective.[12] In its Opinion No. 160, the Commission required Arkla to refund not only the 9.52-cent increase in the base rate, but also an additional 12.64 cents per Mcf, retroactive to November 1, 1980. The total refund required by the Commission was approximately $12,856,239, exclusive of interest, of which approximately $5,523,077 represents the increase in the base rates sought by Arkla (the 9.52-cent per Mcf increase), and approximately $7,333,161 represents a retroactive rate reduction below Arkla's previously-approved, or "last firm", rate (the 12.64-cent per Mcf reduction).

The issue in this proceeding does not relate to the Commission's authority to order a rate reduction for the future pursuant to section 5(a) or to order refunds of the entire 9.52-cent increase for the period it was collected subject to refund pursuant to section 4(e). The sole issue relates to the Commission's lack of statutory authority to make the 12.64-cent per Mcf rate reduction retroactively effective to November 1, 1980.

2. Proceedings Below

After hearings, an ALJ issued an initial decision in which he recommended disallowance of Arkla's entire increase and a reduction in rate to be made effective retroactively to a level below the previously established rate.

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[12] The period November 1, 1980-June 1, 1982, is considered a "locked-in" period because Arkla's rates changed as of June 1, 1982, and the rate determination in Opinion No. 160 related only to the period when Arkla's 9.52-cent per Mcf rate increase was in effect subject to refund.

(App. 25a).[13] He ordered refunds to effectuate his retroactive rate reduction. (App. 25a).

By Opinion No. 160, the Commission summarily affirmed the ALJ without discussing the retroactive rate reduction issue, stating: (App. 11a)

> On the basis of our review, we conclude that the exceptions raise no issues which are not adequately discussed and disposed of in the initial decision, except as to one matter.[14]

On Arkla's timely application for rehearing, the Commission issued Opinion No. 160-A (App. 18a-19a) in which it denied rehearing and summarily rejected Arkla's contention respecting the illegality of the retroactive rate reduction.

Pursuant to section 19(b) of the Act, 15 U.S.C. § 717r (b), Arkla filed a timely petition for review with the Court of Appeals for the District of Columbia Circuit. There Arkla contended, based upon this Court's opinion in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968), that the Commission has no statutory authority under sections 4 and 5 of the Act to order a retroactive rate reduction below the underlying, last firm rate. Without mention of the statutory limitation or the *Sunray* case, the court held that the Commission, by establishing its PGA regulation,[15] had provided itself with authority to order a retroactive rate reduction below Arkla's last firm rate. (App. 3a-4a). The court denied Arkla's timely petition for rehearing without comment. (App. 7a).

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[13] In his decision, the ALJ did not quantify the amount of the retroactive rate reduction.

[14] The issue which the Commission did discuss is not relevant here.

[15] 18 C.F.R. § 154.38(d)(4).

REASONS FOR GRANTING THE WRIT

This case presents for the first time to this Court the issue whether the Commission can, through promulgation of a regulation governing PGA clauses, enlarge its statutory authority contained in sections 4 and 5 of the Act, thereby providing itself with power to order a retroactive rate reduction below a pipeline's previously established just and reasonable rate. This issue transcends this particular case and will have a substantial effect upon the entire natural gas industry.[16] Not only is the issue novel, but it is of signal importance to the natural-gas industry, involving, as it does, a fundamental question of the Commission's statutory authority under sections 4 and 5 of the Act and its asserted power to enlarge its authority through rulemaking. The issue will reoccur, for it opens the door to possible retroactive rate reductions in all pipeline rate proceedings, despite the well-established principle that the Commission lacks authority to order retroactive rate reductions below the last firm rate, *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984). Moreover, the Commission lacks authority to assume a power, through adoption of a regulation, where that power has been withheld by statute, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Basically, the decision of the court below conflicts with the recent decision of the Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp. v. FERC*, *supra*. Further, the express language of the PGA regulation does not authorize the Commission's action here.

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[16] Virtually every natural-gas pipeline has a PGA clause in its tariff. *See* § 154.38(d)(4)(iv)(a), App. 32a-34a.

1. The Commission Has No Retroactive Rate Reduction Authority

Although, under section 5 of the Act, the Commission may order a rate reduction to have prospective effect from the date of its final order, there can be no dispute that sections 4 and 5 of the Act give the Commission no authority to order a retroactive rate reduction below the last firm rate. Section 5(a) is explicit. It limits Commission power to a determination of the just and reasonable rate "to be *thereafter* observed and in force." (Emphasis added). Section 4(e) empowers the Commission to order refunds only of "the portion of such increased rates or charges by its decision found not justified." There is simply no statutory provision permitting the Commission to order retroactive reductions for past periods.

Consistent with this statutory scheme, in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968), this Court declared:

> It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase its price, the Commission may not order it to make refunds simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power. It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditional permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e). (Footnote omitted).

391 U.S. at 24.

In the case at hand, the Commission's retroactive rate reduction of 12.64 cents per Mcf left Arkla "with a

smaller net return than if it had never increased its price at all" for the period November 1, 1980, to June 1, 1982.

Early in the administration of the Natural Gas Act, this Court expressed the limitation of Commission power in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), where it stated:

> It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be *thereafter* observed and enforced." § 5(a). (Emphasis added).

320 U.S. at 618.

The validity of this limitation on the Commission's ratemaking authority under the principles of *Sunray* has been recently recognized by the Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp., et al. v. FERC*, 737 F.2d 1208, 1224 (1st Cir. 1984) (DOMAC). The First Circuit stated:

> The Supreme Court has specifically stated that the pre-existing lawful rate provides a refund floor in a Section 4 proceeding. *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 22-25 (1968). It derived this conclusion from the language of the statute and from the fact that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one.
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> * * * *
>
> The Supreme Court's language clearly interprets Section 4's refund authority as limited to the "amounts received by reason of such *increase*." (Emphasis in the original).

DOMAC, like Arkla, had filed for an increase in its tariff rates exclusive of PGA adjustments. The Commission held that DOMAC's rate should be reduced, not increased. But, in contrast to Arkla, the Commission and the court held that the refund power is limited to the

proposed increase, and the reduction below the underlying rate could be made effective prospectively only. DOMAC stands for the proposition, consistent with *Sunray*, that a company may only be required to make refunds of the applied-for increase, and no more. DOMAC's previously filed and accepted uncontested PGA adjustments did not serve as a basis for refunds where the Commission determined that the company's costs, exclusive of PGA adjustments, had been reduced. In contrast, in the case at hand, the Commission would retroactively reduce Arkla's rate by 12.64 cents per Mcf below the underlying rate. In net effect, the reduction would derive from the uncontested PGA adjustments.

The only mention by the Commission of the retroactive rate reduction issue in the case below occurs in its order denying Arkla's application for rehearing, where the Commission referred to its decision in *Florida Gas Co.*, 19 F.E.R.C. (CCH) ¶ 61,293 (1982).[17] The Commission noted that the applicable regulations "are designed to incorporate a balancing of the pipeline's total jurisdictional costs and revenues at the time a 36-month filing is made." (App. 19a). But this language is irrelevant to the precise issue here. Even assuming that the triennial filing offers the opportunity to match costs and revenues, that process enables the Commission to determine the justification for any proposed increase and to fix rates for the future, but it has nothing to do with the absence of statu-

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[17] Affirmed in *Florida Gas Transmission Co. v. FERC*, No. 82-6041 (11th Cir., Sept. 17, 1984). The company had submitted a triennial rate filing under section 154.38(d)(4) restating its resale rate but suggesting no change in its PGA adjustments or in its separate transportation rate. Florida Gas and interested parties reached a settlement as to the resale rate level. The Commission held that the transportation rate should be reduced. Florida Gas contended that the transportation rate was not part of the base tariff rate and was not involved in the proceeding. In affirming the Commission's decision that the transportation rate was part of the base tariff rate, the court did not reach the precise issue involved here.

tory authority to order a retroactive rate reduction after the Commission has completed the balancing. As this Court stated in *Sunray*, 391 U.S. at 22, there is a floor below which the Commission may not order refunds under section 4(e) of the Act. Yet, the court below echoed the Commission's theme stating, "FERC in promulgating the PGA clause did not give up its authority to review the entire rate structure of a pipeline every three years." (App. 4a). Again, the court below missed the essential issue for although the Commission has authority to review the rate structure every three years, its authority to order a retroactive rate reduction below the previously established rate is nonetheless limited by the restrictions of sections 4 and 5.

2. The Commission Lacks Authority to Grant Itself Power Withheld by Statute

Despite the straightforward prohibition of a retroactive rate reduction authority, both the Commission and the court below, without even mention of *Sunray* or any attempted distinction, relied on the PGA regulation [18] as authorizing the Commission to nullify the limitation of sections 4 and 5 of the Act. There is nothing in the language of the PGA regulation expressly authorizing such action, and even if the language could be so construed, the Commission may not, through issuance of a regulation, arrogate to itself authority that is forbidden to it by the statute, *Ernst and Ernst v. Hochfelder*, 425 U.S. 185 (1976). In that case, this Court stated:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." [19]

425 U.S. at 213-214.

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[18] 18 C.F.R. § 154.38(d)(4). *See* App. 30a-41a.

[19] To the same effect, *see Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1148-49 (D.C. Cir. 1980); *National Assoc. of Regula-*

Note, this case does not involve a question where a company has agreed to forego the exercise of a *right* provided under the Act in order to take advantage of a streamlined filing procedure. The PGA regulation relied upon by the Commission is of an entirely different character pursuant to which the Commission claims to be invested with a *power* not provided by the Act. Even if a company were to agree to forego the exercise of a right, it cannot, by agreement or otherwise, invest the Commission with a power not granted by the Act. A company might agree to a rate moratorium postponing the date for a new rate filing, but it cannot agree, for example, that the Commission can regulate its direct sale rates. Section 1(b) of the Act simply does not delegate that authority to the Commission. By the same token, sections 4 and 5 do not delegate to the Commission authority to order retroactive rate reductions. The Commission's attempt to assert such authority through a regulation is invalid.

It is in this context that the Commission's action must be measured. The facts demonstrate that all of Arkla's purchased gas cost increases from November 1977, through April 1980 had become effective without suspension or refund obligation and no party raised any issue respecting Arkla's PGA adjustments. (R. 15).[20] The Commission made no finding that the PGA adjustments

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tory Utility Commissioners v. FCC, 533 F.2d 601, 617 (D.C. Cir. 1976).

[20] When the Commission believes that a PGA adjustment filing may be unjust and unreasonable, it suspends such filing. When a suspended filing later becomes effective, it is made subject to refund. *See, e.g., East Tennessee Natural Gas Co.*, 27 F.E.R.C. (CCH) ¶ 61,480 (1984); *Midwestern Gas Transmission Co.*, 27 F.E.R.C. (CCH) ¶ 61,481 (1984); *Northwest Pipeline Corp.*, 26 F.E.R.C. (CCH) ¶ 61,417 (1984); *El Paso Natural Gas Co.*, 26 F.E.R.C. (CCH) ¶ 61,423 (1984); *Montana-Dakota Utilities Co.*, 23 F.E.R.C. (CCH) ¶ 61,162 (1983).

were unjust, unreasonable, or unlawful.[21] There is no dispute that Arkla paid the total of 90.62 cents per Mcf of PGA adjustments to its suppliers of natural gas, so that this amount is not available for refunds. Arkla's semi-annual PGA adjustments were fully reviewed by the Commission when they were filed to verify the only cost involved—the purchased gas cost increases. Had there been any question as to these costs the Commission could have suspended them and allowed them to go into effect subject to refund as provided in section 4(e) of the Act. But the Commission did not take that action. As a consequence, the PGA increases became final filed rates reflecting the just and reasonable rates by Arkla's suppliers. As such, neither the Commission nor a court may authorize a retroactive reduction. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981), this Court affirmed the "filed rate doctrine," stating:

> These straightforward principles underlie the "filed rate doctrine", which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.
>
> * * * *
>
> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." . . . This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." (Citations omitted). (Emphasis in the original).

Nevertheless, the Commission held that through application of section 154.38(d)(4)(vi) of its regulations it gained a power otherwise denied to it, namely, to order a

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[21] *See* Opinion Nos. 160 and 160-A (App. 8a-19a).

retroactive reduction below the previously established rate level of 168.73 cents per Mcf. In so holding, the Commission would clothe itself with a power denied it by the Act.

3. The Language of the Commission's Regulation Does Not Authorize the Commission's Action Here

The language of the PGA regulation, section 154.38 (d) (4), confirms the view that the Commission did not, in fact, give itself the wide-ranging authority that it asserted in this case. Instead, the language of the regulation restricts the Commission's authority to the ordering of refunds at the termination of the 36-month period only where a change goes into effect subject to refund and only of that portion of the change found unjust and unreasonable. Properly construed, the regulation complies with the statutory standard.

Subsection 154.38(d) (4) (vi) (*c*) defines the limit or the refund floor.[22] Applied to this case, there is no question that Arkla's 9.52-cent increase was subject to refund as of November 1, 1980, and the subsection provides for nothing more. That subsection is not a source of authority to order a retroactive rate reduction in excess of the 9.52-cent increase. It provides, in pertinent part:

> (c) If . . . it is found based on the aforementioned [cost of service] study, that the jurisdictional cost of service is less than the jurisdictional revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or

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[22] Subsection 154.38(d) (4) (vi) (*a*), which states that a triennial filing shall be subject to refund merely restates the statutory provision of section 4(e). Further, Arkla made its rate filing pursuant to section 154.63 as provided for by subsection 154.38(d) (4) (vi) (*b*). More importantly, subsection 154.38(d) (4) (vi) (*c*) is the provision that prescribes the extent or floor for refunds, the precise issue here.

> determined, and shall refund to its jurisdictional customers *any excess amounts collected subject to refund* to the date of billing under the revised tariff sheets, with interest to that date. *This refund obligation* shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate. (Emphasis added).

Applying the language of this subsection to the facts of this proceeding, the only amount collected subject to refund was the 9.52 cents per Mcf increase above the existing base rate. The limitation "This refund obligation" contained in the last sentence of the subsection must be read in the context of the previous sentence which provides that refunds shall be made of "any excess amounts collected *subject to refund.*" (Emphasis added). In short, the Commission's PGA regulation, when properly read in the context of the Commission's limited power under sections 4 and 5 of the Act, does not authorize the Commission to expand its authority in derogation of *Sunray.* The Commission's contrary interpretation is in error.

CONCLUSION

This case presents the clearcut, novel issue whether the Commission can, through promulgating a PGA regulation, circumvent this Court's unambiguous holding in *Sunray* that sections 4 and 5 of the Natural Gas Act prohibit retroactive rate reductions below the previously established rate. Inasmuch as all pipeline companies have PGA clauses in their tariffs, the issue is important for the industry as a whole, and certainly will reoccur. The inconsistent treatment afforded by the decision of the court below when contrasted with the result in the First Circuit in *Distrigas of Massachusetts Corp. v. FERC, supra,* requires resolution by this Court.

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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